



POLICE DEPARTMENT

March 27, 2015

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Daniel Hill
Tax Registry No. 928487
90 Precinct
Disciplinary Case No. 2014-11496

Detective Timothy Gaven
Tax Registry No. 934913
Gang Squad Manhattan
Disciplinary Case No. 2014-11497

The above-named members of the Department appeared before me on September 26, 2014, charged with the following:

Disciplinary Case No. 2014-11496

1. Said Police Officer Daniel Hill, on or about September 25, 2012, at approximately 0530 hours, while assigned to the 19th Precinct and on duty, in the vicinity of 83rd Street and 2nd Avenue, New York County, abused his authority as a member of the New York City Police Department in that he stopped Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 – STOP AND FRISK

2. Said Police Officer Daniel Hill, on or about September 25, 2012, at approximately 0612 hours, while assigned to the 19th Precinct and on duty, inside the 19th Precinct Stationhouse, New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that he unlawfully detained Person A.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT
PROHIBITED CONDUCT

Disciplinary Case No. 2014-11497

1. Said Police Officer Timothy Gaven, on or about September 25, 2012, at approximately 0530 hours, while assigned to the 19th Precinct and on duty, in the vicinity of 83rd Street and 2nd Avenue, New York County, abused his authority as a member of the New York City Police Department in that he stopped Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 – STOP AND FRISK

2. Said Police Officer Timothy Gaven, on or about September 25, 2012, at approximately 0530 hours, while assigned to the 19th Precinct and on duty, in the vicinity of 83rd Street and 2nd Avenue, New York County, abused his authority as a member of the New York City Police Department in that he frisked Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 – STOP AND FRISK

3. Said Police Officer Timothy Gaven, on or about September 25, 2012, at approximately 0612 hours, while assigned to the 19th Precinct and on duty, inside the 19th Precinct Stationhouse, New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that he unlawfully detained Person A.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT
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The Civilian Complaint Review Board (CCRB) was represented by Gretchen Robinson, Esq., Respondents Hill and Gaven were represented by John Tynan, Esq.

Respondents through their counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2014-11496

Respondent Hill is found Not Guilty.

Disciplinary Case No. 2014-11497

Respondent Gaven is found Not Guilty

Background

On September 25, 2012 Respondents Gaven and Hill were working on an overtime tour in Manhattan from the night before until 6:35 a.m. They were assigned to help locate an assailant who had recently committed multiple gunpoint robberies in three precincts between 2:00 a.m. and 6:00 a.m. At roll call they were given a description of a black male with a balding head and a beard in his 30s weighing between 160 and 200 pounds and between 5'7" and 5'10" tall.

At about 5:30 a.m., while on 83rd Street and Second Avenue, they saw Person A walking down the street. The officers believed that Person A matched the description and photograph of the suspect. They approached Person A and stopped him. Respondent Gaven frisked Person A and found nothing on him.

Respondent Gaven tried to run Person A's identification information through the patrol car computer system, but the computer wasn't working. Respondents recorded the information from Person A's identification (ID), returned his license and let him go.

When Respondents came back to the precinct, Respondent Gaven ran Person A's information and learned he had an outstanding warrant in Bronx County Criminal Court for a marijuana case that was over 13 months old. Respondents then went back out to look for Person A. They found him just after 6:00 a.m. and arrested him for his open warrant.

Respondents brought Person A back to the 19th precinct. From there Person A was transported to the Manhattan Robbery Squad (MRS). While waiting in a jail cell he was then put in a lineup for the pattern robberies. In the lineup, he was not picked out by any of the victims of these robberies.

Over twelve hours later he was brought to Bronx County Criminal Court at 10:00 p.m where the judge vacated his warrant and he received an ACD for the marijuana possession case. On October 2, 2012, someone else was arrested for the series of robberies and indicted for first degree robbery charges.

The exact amount of time that it took Respondent Gaven to run his computer check while Person A was being held is unclear. Respondent Gaven testified that it took him about 20 to 30 minutes. Respondent Hill estimated that Person A was held for about 10 to 20 minutes. Person A never stated how long he was held while Respondent Gaven was trying to check his identification.

Hearsay Statement by Person A

Person A did not appear to testify. CCRB stated that Person A was a homeless individual. He gave CCRB a cell phone number and address. CCRB tried to call him, but the phone number did not work. CCRB also tried to send subpoenas. The investigator, Mr. DeAngelo, learned that the address Person A used was a PO box address known to be used by homeless people. The address did not list a specific box so Person A could not actually receive mail. The CCRB attorney never spoke with Person A because she received the case almost 13 months after his initial interview with another investigator, Ms. Henry. The advocate did not know whether anybody spoke with Person A or followed up with him since the interview.

For its case in chief, CCRB placed into evidence the transcript of its interview of Person A on October 2, 2012. (CCRB Exhibit 1A) CCRB also entered into evidence a photograph of Person A. (CCRB X2).

Person A told the CCRB investigator that on September 26, 2012 at about 5:30 a.m. he was walking around the area of 77th Street and 2nd Avenue. He was not supposed to meet his friend until two hours later. Even though the buses were running and he had a metro card, he said, "I figured I'll just kill the time and just walk until I get there." He was walking at a "very slow pace." He was meeting his friend just for "hanging out."

He noticed a black car which he thought was a police car with tinted windows following him. The window rolled down and a passenger who he believed was an officer snapped a picture of him using a cell phone. When he turned on the corner of 77th and 2nd, the car slowed down, the officers got out of the car on the corner "and cut off my path of freedom to walk."

One officer asked if he could talk to him. Person A declined. Meanwhile, the second officer "definitely cut my freedom off so I had nowhere to go." That officer told him that he "wasn't exactly free to go." Respondent Hill said to Person A in substance, "[Y]ou look like someone we're looking for" and showed him what Person A indicated was a picture on a cell phone.

Respondent Gaven also gave Person A a "pat down" against the gate of a wall. He asked Person A for his identification and Person A gave it to him. Then Respondent Gaven went to check his ID with the computer. There was a problem with it. Person A kept telling him that he "had nothing to say to him, I want my ID and I wanna be able to be allowed to move again." The officer took a picture of his ID with his cell phone and Respondents let him go.

Later, Person A was walking along 57th or 59th street. The same officers came by in the same car, got out of it and threw him up against the car. Respondent Gaven said to him in substance, "[Y]ou have a warrant asshole." Person A complained, "[Y]ou stopped me, you let me go and now you arrest me for something unrelated to why you just stopped me the first time."

Respondents took him to the 68th Street precinct. While he was waiting he watched Respondent Gaven walk around showing other officers his photograph. Person A believed that Respondent Gaven was then told to contact the detectives on the case.

Person A was then transported to the 14th Street station, brought into a room and questioned. He told his interrogators he wanted a lawyer and that he wanted to leave. He watched a videotape "against my will" of a suspect robbing people on the Upper East Side. One of the officers "pretty much seemed convinced that it wasn't me." Since

Person A would not give them an alibi for where he was when this robbery was committed, he was told he had to do a lineup. He refused, but was told he could not go free unless he did the lineup. He was told if he was picked, he was going to jail.

Around 10 p.m. he was driven to the courthouse. At Bronx Criminal Court he was released with an ACD.

FINDINGS AND ANALYSIS

CCRB argued that the description of the suspect that Respondents were given at roll call was too vague and could apply to half of the city. There was no description of the person's clothing. There was no description of whether the person's complexion was light or dark skinned. Unlike Person A, the suspect had been seen wearing a shiny, big watch. CCRB maintained that Respondents were looking for a black man and "that's exactly what they found." They had no other information to establish that Person A was involved in this pattern robbery. Because there was no visible bulge or any indication that Person A was carrying a dangerous weapon, CCRB argued, Respondent Gaven was unjustified in conducting a frisk.

The legal basis for a stop is reasonable suspicion that a person has committed, is committing, or is about to commit a crime. *Patrol Guide* 212-11 provides that factors which contribute to "reasonable suspicion" include the demeanor of the suspect, the gait and manner of the suspect, any knowledge the officer may have of the suspect's background and character, and the particular streets and areas involved.

Respondent Gaven and Respondent Hill were assigned to a special tour that night to look for a suspect who was committing a series of robberies between 2:00 a.m. and 6:00 a.m. in three nearby precincts. During these robberies the suspect displayed a black firearm. Respondents were told that there were “a couple of instances where the person was actually physically injured during the struggle over their property.” The suspect was described as a black male, between 5’ 7” to 5’ 10”, 160 to 200 lbs, bald with facial hair, and in his mid 30s to 40s. Respondents noticed Person A because he was a bald black man with facial hair who “appeared to be 30 to 45 years old,” 5’7” and “around 200 pounds.”

CCRB argued that the suspect and Person A do not look the same and presented photographs of the two individuals as evidence. CCRB X5 is a picture of a bearded Robert Hill from the New York City Department of Correction. CCRB X2 is a picture of a clean shaven Person A on the day that he came to CCRB to be interviewed. However, Respondent Gaven testified that the night that he saw Person A, A had a beard of a couple of days of growth. In the photograph taken at the lineup at MRS on the same day, Person A appears to have a light beard. (RX C). It is reasonable that Respondents could have perceived Person A, as depicted in RX C, to look similar to the picture that they had of the suspect on that same day. (RX B).

As Respondent’s attorney argued, CCRB’s characterization of Respondents’ randomly stopping black men is inappropriate. This was the only stop Respondents conducted that night. Respondents credibly testified that they saw an individual who they believed matched the description and photographs they were given and who was in the same area at the same time as the serial robberies had been committed. When they approached and asked him where he was coming from and where he was going,

Respondent Gaven testified, Person A's explanation did not make any sense.

Respondent Gaven also noted that while Person A was answering their questions, he would not look at them. All of these factors, when taken together, rise to the level of reasonable suspicion. Thus, the Court finds that Respondents articulated a legal basis for their stop of Person A.

An officer can frisk if he reasonably suspects he or others are in danger of physical injury. *P.G. 212-11*. When the underlying stop is for a violent crime, such as robbery or burglary, the officer's suspicion "not only justifies the detention but also the frisk, thus making it unnecessary to particularize an independent source for the belief of danger." *People v. Mack*, 26 N.Y.2d 311, 317 (1970). *See also* Legal Bureau Bulletin, Vol. 1, No. 3, p. 3 (Mar. 31, 1971). Respondents suspected Person A of committing multiple robberies, displaying a firearm and injuring victims during the robberies. In explaining why he frisked Person A, Respondent Gaven articulated that he believed Person A could be carrying a weapon and was concerned for his own safety. When he found no weapon and was unable to use the mobile digital terminal (MDT) to determine whether Person A had a criminal history, Respondents released Person A.

CCRB also argued that twenty minutes was too long a time to detain a civilian. However, courts have been reluctant to establish any fixed time frame for detention. The issue is whether the officers held Person A longer than necessary to gain information vital to their investigation. (See *Case No. 10273/2013* (Nov. 26, 2014).

The Supreme Court has delineated a three prong test to determine if the length of an investigative stop is reasonable. *United States v. Sharpe*, 470 U.S. 675 (1985). *See also* *People v. Hicks*, 68 N.Y.2d 234 (1986), *People v. Banks*, 85 N.Y.2d 558 (1995), *People v. Edwards*, 884 N.Y.S.2d 528 (2009). First, the action must be reasonably

related in scope to the circumstances justifying the interference in the first place. In this case, the officers initially stopped Person A due to his resemblance to someone who had committed multiple robberies at gunpoint, and due to his presence in the general place where and time when these robberies occurred.

Secondly, the *Sharpe* test requires that during the time the defendant is detained, the police must diligently pursue a means of investigation that is likely to confirm or dispel their suspicions quickly. In this case, the MDT did not function properly and prolonged the stop. Checking Person A's identification with the MDT could have revealed information which would have confirmed or dispelled Respondents' suspicions immediately. After diligently trying to reboot the MDT several times and failing, Respondents let Person A go. Running Person A's ID through their patrol car computer was a legitimate step in their investigation.

Thirdly, in evaluating whether an investigative detention is unreasonable, *Sharpe* states common sense and ordinary human experience must govern over rigid criteria. This is because officers should have leeway in the time needed for detaining an individual during an investigatory stop. Respondents took a justifiable amount of time to try and correct the MDT while pursuing an investigation into gunpoint robberies, some of which had resulted in victims being injured by the assailant. Under the *Sharpe* standard, detaining a suspect in these circumstances for 20 or possibly 30 minutes during an investigatory stop was reasonable.

CCRB also argued that by bringing Person A to a line-up and holding him for the entire day instead of immediately bringing him to court to address his open warrant, Respondents illegally detained Person A. CCRB illustrated its argument by referring to a

hearsay statement made to Person A within Person A's hearsay statement. While Person A was waiting in Bronx Criminal Court, an officer sitting behind Person A indicated that it was Respondent Gaven's idea to place Person A in the lineup. This officer was the "second officer from the 14th street" who was "heavy set":

He [the heavy set second officer from 14th Street] was saying something like I don't know what happened between you guys maybe something happened between you for him to do what he did to you. He said we weren't interested in you and he said that as far as I'm concerned he said when he was picked up, you didn't have a book bag or a gun and you didn't have no property that belongs to you. He said we weren't interested as soon as we heard that description. He said you didn't fit the profile of who he was looking for. But he told me that once the call was made, higher ups got involved and there's people over him that was forcing him to go along with it.

Person A continued,

[H]e was saying that Kevin [meaning Respondent Gaven] was the initial prejudice that made all this happen, that I should have been directly just brought to court after I was picked up to answer for the warrant." The officer also said, "The captain of that station . . . must have a loose cannon because he allowed Kevin to do all these."

Person A expressed anger that Respondent Gaven "forced me to a lineup for a crime that I could have done 20 years ago."

Respondent's counsel objected to the hearsay nature of this evidence being considered. The CCRB attorney indicated that a reading of the entire transcript of Person A's CCRB interview would illuminate Person A's statements and CCRB's argument about how Respondents were responsible for Person A's unjustifiable daylong detention.

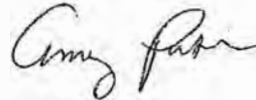
A review of Person A's interview failed to support CCRB's argument. In fact, during the interview the CCRB investigator herself explained in substance that CCRB could not charge Respondents for Person A's being held for the line up and having to wait the whole day to be transported to court. She indicated that Respondents were not the

officers responsible for deciding to detain Person A in this way.

Moreover, such a charge was outside CCRB's jurisdiction and needed to be referred to the Internal Affairs Bureau. Besides a hearsay statement within a hearsay statement from a complainant not subject to cross-examination, CCRB provided no evidence to show that either Respondent Gaven or Respondent Hill were responsible for holding Person A for the lineup and for keeping him from being immediately transported to criminal court. Even in this hearsay within hearsay statement relied on by CCRB, the "second officer from 14th Street" noted that the "higher ups," and not Respondents, were the ones who were making the decisions about holding Person A for the line up.

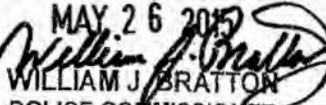
Accordingly, Respondents are found Not Guilty of all charges.

Respectfully submitted,



Amy J. Porter
Assistant Deputy Commissioner Trials

APPROVED

MAY 26 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER